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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 781

W. G. DUNCAN, TRANSFEREE OF SAN ANTONIO DRIVERLESS CO., INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 33–41) are unreported. The opinion of the Court of Appeals for the Fifth Circuit (R. 86–87) is reported at 173 F. 2d 218.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1949 (R. 87). The petition for a writ of certiorari was filed on May 11, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Did the Tax Court and the Court of Appeals err in concluding that the income for the year 1943, returned by the San Antonio Driverless Company as a corporation, was its income rather than that of the alleged partnership, Texas Driverless Company, for a portion of 1943, and of W. G. Duncan as an individual for the remainder of that year?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from * * * the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

STATEMENT

The facts pertinent to the issue here, as found by the Tax Court (R. 34–37), may be summarized as follows:

W. G. Duncan, the taxpayer, was engaged in the operation of taxicabs in San Antonio. In September, 1940, he became associated with Frank Manley in a business known as the Texas Driverless Company (hereinafter referred to as Texas), a publicly registered name owned by

them. Manley furnished five automobiles and taxpayer thirty-five, which he purchased by giving his notes for the price and making payment from earnings of the business. The automobiles were rented for periods of not less than an hour. Because law suits were pending against him, taxpayer feared that the automobiles would be seized for the satisfaction of judgments and, on the advice of counsel, taxpayer's wife, Manley and another organized the San Antonio Driverless Company, Inc. (hereinafter referred to as San Antonio), as a Texas corporation on December 14, 1940, and title to the automobiles was transferred to it without cash consideration (R. 34–35).

The recited purpose of the corporation was "to conduct a livery and transfer business with auto and horse drawn vehicles, and for the sale of such vehicles." Of its authorized capital stock of $500, 48 percent was reported on its 1941 income tax return as owned by taxpayer, 48 percent by Manley and 2 percent by another. On its 1943 return, the taxpayer and Manley were each declared to hold 2 percent of its stock (R. 35).

Under date of January 2, 1941, San Antonio made a formal contract for lease of its automobiles to Texas described therein as "owned and operated by Frank Manley." The lessee agreed to pay $2 a day for the use of each car,

to keep the vehicles in good repair and to make replacements when necessary (R. 35).

After San Antonio was organized, the business was operated in the same manner as before; the same pads of printed contract forms bearing the name of Texas were used by customers and that name remained listed in the telephone directory and on the neon sign displayed on the leased building which served as business quarters. Bills of goods and services were rendered as before to Texas and the name "Texas Driverless Company" was publicly recorded as owned by San Antonio. The only bank account maintained was carried in the name of San Antonio; all receipts from operation of the business were deposited in that account, and all bills in the business were paid by checks drawn against it (R. 35–36).

Before and after organization of San Antonio, records of the business were kept in a loose-leaf book showing cash receipts and disbursements, and in a ledger which fails to indicate the source of postings to it and does not balance. No attempt was ever made to segregate income and disbursements between the corporation, partnership or individual. No entries ever indicated the payment or receipt of the automobile rental fixed by the contract, or transfer of the automobile titles (R. 36).

On March 1, 1943, taxpayer purchased Manley's "half interest in the Texas Driverless Company and the San Antonio Driverless Com-

pany" for $10,000. On or about December 31, 1943, San Antonio transferred all its assets, subject to certain of its liabilities, to the taxpayer, then sole owner of its capital stock. The net value of these assets was not less than $16,728.15; San Antonio has since had no assets. It was dissolved on January 3, 1944 (R. 36).

San Antonio filed income tax returns for 1941, 1942, and 1943 as a corporation. A partnership return was filed by Texas for 1942 but none was filed for 1941 or 1943. On the corporation return for 1941, income and deductions for the business as a whole were reported. On the corporation return for 1942, "car rentals" of $18,044 and a loss of $4,839 from the sale of cars were reported, leaving a gross income of $13,205, and from this figure $13,205 was deducted as depreciation. On the partnership return for that year, car rental of $18,044 was deducted as an expense. In January, 1944, a revenue agent examined such books as were maintained, and on the basis of his report in which all income from the driverless car business was imputed to San Antonio for 1941 and 1942, San Antonio included all such income in its 1943 return (R. 37).

The Commissioner determined that San Antonio was taxable as a corporation on the profits of the business for 1943 and that Duncan was liable for the taxes as transferee (R. 37).

The Tax Court sustained the Commissioner (R. 41) and the Court of Appeals for the Fifth Circuit affirmed the Tax Court's decision (R. 87).

ARGUMENT

Insofar as any generally applicable substantive tax principle is concerned, the decision below, that the income of the car rental business was taxable to the corporation that conducted it, is in complete harmony with decisions of this Court. *Moline Properties* v. *Commissioner,* 319 U. S. 436; *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422. Taxpayer's only disagreement is based on the factual contention that an alleged partnership, not the corporation, earned the income attributed by the Commissioner to the latter and to taxpayer as transferee. His reason for issuance of the writ is that the Court of Appeals viewed the effect of the presumptive correctness of the Commissioner's determination in a manner in conflict with the view of the Court of Appeals for the Tenth Circuit in *Crude Oil Corp.* v. *Commissioner,* 161 F. 2d 809, and other cases alleged to be similar (Pet. 5).

We think there is no merit in this contention. Although the Court of Appeals did place its decision in part on the failure of taxpayer to carry its burden of proof, it did so in a way entirely consistent with the decided cases. *Welch* v. *Helvering,* 290 U. S. 111, 115; *Lucas* v. *Structural Steel Co.,* 281 U. S. 264, 271; *Commissioner*

v. *Heininger,* 320 U. S. 467, 475. Taxpayer's contention of conflict depends on the erroneous assumption that the trier of fact was required to believe the interested testimony of the taxpayer[1] although inconsistent with the other evidence. See *H. Levine & Bros.* v. *Commissioner,* 101 F. 2d 391 (C. A. 7th); *Keck Inv. Co.* v. *Commissioner,* 77 F. 2d 244, 245 (C. A. 9th), certiorari denied, 296 U. S. 633.

In any event, the decision below was not based solely on taxpayer's failure to overcome the presumption since the court accurately pointed out that the finding of the Tax Court was supported by substantial evidence. This statement of the Court of Appeals is particularly significant in light of the Tax Court's statement (R. 39) that "this determination conforms to reality, and petitioner's evidence tends to support rather than rebut it." Indeed, the record shows that it would be difficult to imagine a finding more fully supported by the record than that put in question here.

The case, then, presents no occasion for issuance of the writ since, admittedly, the only

[1] The contention is in clear conflict with Rule 52 (a), Federal Rules of Civil Procedure, which governs the review of Tax Court decisions by reason of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d Sess., Section 36. Under this rule the findings of the trier of fact are not to be "set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

question is the correctness of the factual findings concurred in by both courts (Cf. *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 542; *Baumgartner* v. *United States*, 322 U. S. 665) which we think were beyond question correct, and there is no conflict of decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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